APPENDIX A.

OHIO STATUTES RELATING TO EXECUTION OF SENTENCE AND SUSPENSION OF SAME.

2 Swan & Critchfield (1870), Revised Statutes of Ohio, p. 1189. Sec. 4, act of March 27, 1841 (not found in latest revision):

> (66) SEC. IV. That it shall be the duty of the court, when any person shall be convicted of a capital crime or offense, or a crime or offense the punishment whereof is imprisonment in the penitentiary, to order the person so convicted into the custody of the sheriff, to be imprisoned in the jail of the county until legally discharged; etc.

The General Code of Ohio, 1910:

> SECTION 13701. If execution of sentence is not suspended by the next term of the court after *the sentence was pronounced*, the court, at such term, *shall carry it into execution*. (R. S., sec. 7323.)
>
> SECTION 13702. If a petition in error is filed and execution is suspended and, on the hearing, the judgment of the court in which the trial was held affirmed, such *court shall carry into* execution the sentence pronounced against the defendant at the next term after such judgment of affirmance is rendered. (R. S., sec. 7324.)
>
> SECTION 13703. When a person is sentenced for a felony and execution of such sentence is suspended, *the court shall order him into the custody of the sheriff to be imprisoned until the case is disposed of*, etc. (R. S., sec. 7325.)
>
> SECTION 13720. A person sentenced to the penitentiary (* * *), unless the execution

thereof is suspended, shall be conveyed to the penitentiary (* * *) by the sheriff of the county in which the conviction was had within thirty (five) days after such sentence and delivered into the custody of the warden of the penitentiary (* * *) with a copy of such sentence, there to be kept until the term of his imprisonment expires or he is pardoned. If the execution of such sentence is suspended and the judgment be afterwards affirmed, he shall be conveyed to the penitentiary (* * *) within thirty (five) days after the court directs the execution of the sentence; (provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance.) (R. S., sec. 7330.)

SECTION 13698. When a person has been convicted of an offense, and gives notice to the court of his intention to file, or apply for leave to file, a petition in error, such court, on his application, may suspend execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session, as will give him a reasonable time to apply for such leave. (R. S., sec. 7321.)

SECTION 13699. In a case wherein judgment of conviction by the court of common pleas has been affirmed by the circuit court on error and remanded to the common pleas court for execution of judgment and sentence, and the person so convicted gives notice of his intention to apply for leave to file a petition in error in the supreme court, the court of common pleas or the trial judge at chambers, on motion of such person, if made within three days after the rendition by the circuit court of the judgment of affirmation, shall further suspend the execution of sentence for a time

sufficient to give him an opportunity to apply for leave to file a petition in error in the supreme court, and to file it, but such sentence shall not be suspended more than thirty days. (R. S., sec. 7321.)

SECTION 13700. The execution of a sentence or judgment against a person sentenced for a misdemeanor shall not be suspended unless he enter a recognizance, with surety approved by the court, that he will appear at the next term of such court and from term to term thereafter until the case in error is determined, and abide the judgment or sentence of the court. (R. S., sec. 7322.)

SECTION 13735. If a convict, sentenced to death, appears to be insane, the sheriff shall forthwith give notice thereof to a judge of the court of common pleas of the judicial district, summon a jury of twelve impartial men to inquiry into such insanity at a time and place to be fixed by such judge, and give immediate notice thereof to the prosecuting attorney. (R. S., sec. 7345.)

SECTION 13736. The judge, clerk of the court, and prosecuting attorney shall attend the inquiry. Witnesses may be produced and examined before the jury and their finding shall be in writing and signed by them. If it be found that the convict is insane, the judge shall suspend the execution until the sheriff receives a warrant from the governor directing such execution. The finding of such jury and order of such judge, certified by him, shall be entered on the journal of the court by the clerk. (R. S. sec. 7346.)

SECTION 13738 (R. S., sec. 7348) provides for inquiry as to pregnancy of female convict.

SECTION 13739. If such jury shall find that such convict is with child, the sheriff, in a like manner, shall suspend the execution of

her sentence and transmit such finding to the governor, who, when satisfied that such convict is no longer pregnant, shall issue a warrant appointing a day for her execution. (R. S., sec. 7349.)

(NOTE.—Matter inclosed in parentheses in body of section 13720 (R. S., sec. 7330) indicates amendment since 1910.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

NO. 12, ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

BRIEF OF THE UNITED STATES IN REPLY.

PART I.

REPLY TO BRIEF FOR RESPONDENT.

THE CONVICT HIMSELF HAS NO RIGHT TO DEMAND SUSPENSION.

Respondent insists (brief, pp. 71–79) that a sentenced person may have an absolute right to demand suspension of execution until he can have applied for a pardon and the application has been refused; this on the theory that he has a right to a fair hearing of the application, and that such right carries with it a right to get the application before the President and have the same disposed of before he must submit to punishment. A pardon has been understood to be an act of grace and mercy. It is not believed that any absolute right can arise in connection therewith.

Were such a right to be recognized every convict would insist on suspension and delay his application for pardon under every plausible excuse, in order to postpone the punishment, upon the hope that somehow he might ultimately escape it altogether.

IS INDEFINITE SUSPENSION OF EXECUTION A PHASE OF THE PARDON POWER?

Respondent now concedes that, subject only to the qualification as to *fines* announced by this court in *The Laura*, 114 U. S. 411, the power of reprieve and pardon is an exclusively executive function.

Upon the sequential question whether an indefinite suspension of execution amounts to a pardon, commutation, or remission, while the Government announced the affirmative, it chose in argument to canvass the question from a negative standpoint (p. 10, *et seq.*), for to prevail in this proceeding it was not at all necessary to establish the affirmative. If it be a phase of the pardon power, this alone would stop the inquiry and determine the judgment to be rendered by this court. But if not, we insist that before a court or judge may exercise the function it, or he, must possess the power; and that the power could only have been acquired either (1) through the common law or (2) by congressional enactment.

While admitting the conflict in authority as to whether it is a phase of the pardoning power, we cannot allow the classification as made on page 67 of respondent's brief to go unchallenged.

For the idea that indefinite suspension of execution represents a phase of the pardon power (in addition to the decisions in North Dakota and Texas holding a statute conferring the power unconstitutional for that reason), the following authorities so declare independently of statute, as a conclusive reason against the enjoyment of such a power by courts: 12 *Columbia Law Review* (original brief, p. 19); the *Wilson* case (p. 20); the *Webb* case, (Wis.) (brief p. 26–27); the *Brown* case (Mich.) (p. 29); the *Neal* case (Ga.) (p. 31); the *Abbott* case (S. C.) (brief p. 32). And there may be added in addition, *Ex parte Clendenning*, 22 Okla. 108; and *State* v. *Voss*, 80 Iowa 467.

Of the cases listed by respondent, p. 67, as upholding as constitutional, statutes authorizing judicial suspension, the Michigan cases and the *Sessions* case (N. Y.) have been fully considered in the original brief.

In *Commonwealth* v. *Halloway*, 42 Pa. St. 446, a statute provided for a graduated "*deduction from the term of sentence*" of every prisoner having no infraction of rules recorded against him during the first year of his imprisonment, etc.; and empowered prison inspectors to discharge whenever he had served his term, less authorized deductions. The court held the act not an interference with the pardoning power, but *an invasion of the realm of the judiciary.*

In *Ex parte Parker*, 106 Mo. 551, a statute provided that the judge, at the request of the defendant unable to pay a fine, might commute such fine to imprison-

ment at so many days for each dollar fine. It was held that such statute did not interfere with the pardoning power, but simply provided an alternative punishment.

In *People* v. *Heise*, 257 Ill. 443, a statute punishing wife abandonment, provided—

> that before the trial (with the consent of the defendant) or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion * * * shall have the power to pass an order * * * subject to change * * * as the circumstances may require directing the defendant to pay a certain sum weekly for one year to the wife * * * and to release the defendant from the custody, on probation, for the space of one year, upon his or her entering into a recognizance, etc. (446.)

The defendant had been convicted of abandoning his wife and the court ordered him, in compliance with the statute, to pay, etc. Defendant gave the required recognizance; but at once sued out a writ of error to review the court's order. Various grounds of unconstitutionality were alleged, but there was no contention that the statute interfered with the pardoning power. It is true that the opinion did, at page 450, consider the contention—

> that the statute is invalid because it authorizes the court to suspend sentence for an indefinite period of time (saying) but we know of no reason why the legislature may not give the courts the power, in certain classes of

> cases, to suspend sentence upon the defendant entering into a recognizance and thereafter impose sentence and enforce its execution.

The above shows clearly that the opinion dealt with the statute as merely authorizing suspension of *imposition* of sentence, and not execution. The distinction from the case at bar also appears in the very statute itself.

In *People* v. *Stickle*, 156 Mich. 557, the statute (wife abandonment) also related to suspension of imposition and not execution of sentence. It expressly provided—

> if, at any time before sentence, he shall enter into bond, etc., then the court may suspend sentence * * *. (559.)

In *Ex parte Bates*, 151 Pac. 698, the court distinguishes between a suspension order itself a part of the sentence, and one made after and apart therefrom and says:

> As we understand the contention of the Attorney General, it would appear that he has assumed that *the Legislature has* no *right to authorize any court* to *suspend a sentence already imposed*, and *in this we might agree that the Attorney General is correct;* but such is not the state of facts presented for our consideration at this time. (699.)

In the case at bar the order suspending execution was made after sentence and was a distinct and separate order of the court.

In *State* v. *Mallahan*, 65 Wash. 287, the order suspended *imposition* only, under a statute pro-

viding that the court might in the case of juveniles "withhold and suspend sentence and * * * have power to order his or her rearrest and pronounce sentence whenever, * * * etc.

In *In re Giannini*, 18 Cal. App. 166, the statute gave the court power to suspend both imposition and execution. The particular sentence imposed itself contained the order of suspension. Thus the case falls within the limitations in that regard of some of the cases *supra*. At least, it can not be said that the case holds that an independent and subsequent order of a court suspending a sentence already imposed would be valid, even if the statute contemplated such a suspension, which does not at all appear.

Even if indefinite suspension of execution were different from and less than a pardon, nevertheless the function does not inhere in courts and would require congressional authority for its exercise.

NO IMPLIED POWER OF INDEFINITE SUSPENSION INHERES IN ANY COURT.

Respondent's whole argument for implied power (brief, pp. 57–60) is based on the primary assumption that such a power inhered in the courts at the common law; and he indulges this assumption despite his concession (brief, p. 11) that after fullest investigation he himself can not assert that this was the case.

If his argument be limited by the common-law authorities he cites, it is to the effect that the judicial

power of reprieve exercised at the common law must be restored to the judges, in part at least; and must be so altered and extended in its scope as to now reach any case which an individual judge might regard as extraordinary, and to justify suspension for an indefinite time, and without any purpose other than possible reformation.

THE COMMON-LAW AUTHORITIES NEVER DECLARED SUCH A POWER.

Disregarding the three instances of suspension of (fine) *imposition* (p. 19) and the emotional act at the Chester Assizes (pp. 17, 18), all of the common-law authorities quoted in Respondent's brief (pp. 4–20) deal solely with "*reprieve.*" Chitty and Blackstone assert (respondent's brief, p. 9) that there were *but two* modes of staying *execution* of a sentence: (1) by reprieve and (2) by pardon; and that reprieve "operates *only* in *capital* cases." "Reprieve" was fully exploited in the government's original brief (pp. 23–25), with citation of the very authors quoted by respondent. There is no dispute as to its scope and purpose. The chief causes moving for its exercise were: (1) insufficient indictment; (2) insufficient evidence; (3) that the convict might not be hung before he could be pardoned; (4) insanity; and (5) pregnancy.

From a judicial standpoint the first two are *now* cared for by motion for new trial or in arrest of judgment; and, as shown by the extract from the opinion of this court in *Ex Parte Wells*, 18 How. 307

(quoted in respondent's brief, p. 46), ALL five are available to the President under his "reprieve" power.

Respondent concedes that common-law courts never assumed to pardon. Section 2 of Art. II of the Constitution lodged both the reprieve and the pardon power in the President *exclusively;* and this distribution accords with the view of Blackstone, announced in the very chapter quoted from by respondent, and as follows:

> * * * *in democracies*, however, this power of pardon can never subsist; for *there* nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes) would oblige him very often to contradict himself, to make and unmake his decisions; it would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell whether a prisoner were discharged by his innocence or obtained a pardon through favour. (Blackstone, Tucker's Ed. 1803, Bk. 4, Ch. 31, p. 397.)

The uncertainty of respondent as to the meaning of the word "reprieve" accounts for his use of these common-law authorities; and also explains his frank confession (his brief, p. 11, ft.) that he *can not assert* that they sustain the power to indefinitely suspend sentence.

STATE DECISIONS DENIED IT.

In his summary of *State* decisions (pp. 25–37), respondent does not distinguish between those based and those not based on statute. Assuming, but not conceding, the correctness of his classification, these results follow:

1. He finds that in four States—Connecticut, Michigan, Ohio, and West Virginia—the decisions are uncertain.

2. He finds the subject now regulated by statute in three States—Indiana, North Dakota, and Washington (he might have added New York, Maine, Massachusetts, New Hampshire, and the District of Columbia).

3. He finds that in nine States—Arkansas, California, Florida, Georgia, Iowa, Maine, New Hampshire, New York, and Pennsylvania—as well as the District of Columbia, it is asserted that courts possess power to suspend indefinitely the *imposition* of sentence; while three more—Massachusetts, New Jersey, and North Carolina—declare it may be done only if the defendant consents. But he finds that in ten States—California, Illinois, Indiana, Kansas, Louisiana, Mississippi, Maine, Tennessee, Texas, and Utah—as well as the Territory of Hawaii, the power to so suspend *imposition* is denied.

4. He finds that in three States—New Hampshire, New Jersey, and New York—it is asserted that courts possess the power to suspend indefinitely the *execution* of a sentence; and that in one more—North Carolina—the power is recognized only in case the

defendant consents. But he finds that in twenty-one States—Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Massachusetts, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, Texas, Wisconsin, and South Carolina—this power is denied.

NOTE.—In four of the States in the above classification, while the power to suspend *imposition* is asserted, the power to suspend *execution* is denied.

By his own confession, then, the preponderance of State decision is against respondent as to indefinite suspension of each, imposition and execution; as to the latter, overwhelmingly so. But we challenge the correctness of this classification. In our original brief (pp. 34–37) we analyzed the New York decisions to show that until the statute of 1893 the rule of decision was otherwise; we analyzed the New Jersey decisions, to show that they do not unqualifiedly assert this power (pp. 37, 38); we quoted the latest North Carolina decision to the effect that the court found itself without benefit of precedent on the question they were considering, viz, whether they would permit a *defendant*, who had himself sought a suspension order, to attack the sentence as void because thereof (pp. 38, 39); and we quoted the *Sylvester* case (N. H.), to show that the order was upheld only because made by consent of both defendant and State, and because such practice was sanctioned by statute. In the other New Hampshire case cited by respondent (the *Drew* case, 75 N. H. 402) defendants were seeking release on habeas corpus, on the

ground that a stay which they themselves had secured vitiated the whole judgment—the very question recently decided adversely to petitioner *Adams*, by the Eighth Circuit Court of Appeals, in *United States* v. *Adams*, not yet reported, but listed in respondent's brief (p. 47).

So we assert that the unbroken line of State decisions denies the right of a court to indefinitely suspend the *execution* of a criminal sentence. We refrain from now analyzing the classification as to imposition because that question is not here involved.

In this connection and as challenging that uncertainty of decision which respondent claims to exist in his State (Ohio), on October 9 last the Court of Common Pleas of Franklin County in *State* v. *Radcliffe*, in a well reasoned opinion, distinguished the *Weber* case, relied on by respondent, as involving but a misdemeanor, and merely the power to change sentence during the same term; and further held that the court had no inherent power after sentence to indefinitely suspend its execution; that its power was strictly limited by the terms of the statute (see our original brief, pages 41–44), that the statute did not extend to such a case, intimating that it would involve an exercise of executive power. Wherefore it denied the application.

As the opinion is not otherwise accessible, we print it in an appendix hereto.

THE ACQUISITION OF SUCH A POWER BY ITS MERE EXERCISE IMPOSSIBLE.

Though the major portion of respondent's return is devoted to laying a foundation for this claim, but eight pages of the brief (pp. 54–57 and 60–65) deal with the question.

We have no quarrel with the principle announced by the authors quoted, that law may be developed by usage, well defined, long continued, uniform, and itself not opposed to law. But no case for the application of that principle can be spelled out of this record.

The supporting facts averred in the return (pp. 4–8) are traversed in part by the government's answer thereto; and the latter also avers additional facts. Respondent submits no evidence in support of his own traversed allegations, nor has he joined issue with the additional facts averred by the government. He but insists that this court shall judicially notice the true facts in that regard. This the court may not do.

In 7 *Enc. U. S. Sup. Ct. Reps.* 687, it is said:

> The Supreme Court takes judicial notice of its own records * * * but not of the records of other Federal courts—etc.

In *Eyster* v. *Gaff*, 91 U. S. 524–525, this court said:

> It (the trial court) could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

In 1 Jones Comm. on Evidence, sec. 124, p. 597, it is said:

> But in a given case, the court is not held to have judicial knowledge of the pendency of proceedings in other causes in the same court; much less of those in other courts. (Citing *Eyster* v. *Gaff*, supra; *Nat'l Bank* v. *Bryant*, 13 Bush (Ky.) 419; *People* v. *De La Guerra*, 24 Cal. 73; *McCormick* v. *Herndon*, 67 Wis. 648.)

See also 1 Greenleaf on Evid. 15 Ed., Sec. 6–a, p. 14, note f, and cases.

From the return and reply thereto, however, enough conceded facts appear to show that (1) the practice never was alike in all parts of the United States; (2) within single States, the practice in some cases, differed in different districts; (3) within a single district the practice at one period would be one way and at another period the other way; (4) many judges exercised the function without any claim of right other than ex necessitate, and some even admitted their lack of power; (5) After 1891 and 1894, respectively, whenever exercised, it was in the face of the *Wilson* case, 46 Fed. 748, and the *Pointer* case, 151 U. S. 396, 420; and (6) It was always done in the face of statutes prescribing the punishment for crimes, and the established principle of public policy that offenders against the law should suffer its penalties.

What force should be given to such a practice?

As to more than 80 district judges not referred to in the return or its traverse (and because this question is only material on the theory that the power was never bestowed by law), the presumption obtains that their every official act was in conformity to law until the contrary is shown. *Williams* v. *United States* 1 How. (U. S.) 290; *Balt. & P. R. R. Co.* v. *Sixth Pres. Church*, 91 U. S. 127; *Harvey* v. *Tyler*, 2 Wall. 328; *Nations* v. *Johnson*, 24 How. (U. S.) 195. And so this court must assume that each of them has steadily refused to indefinitely suspend sentence. This presumption is peculiarly fair here, for, while court records would necessarily show every suspension, they might not show the contrary action; as applications could be made orally and ex parte, and denied without any written record, save the order of commitment.

Considering only the showing of the return and traverse, however, no power by usage could be developed because that usage was never general, reasonable, consistent or uniform, *United States* v. *Buchanan*, 8 How. (U. S.) 82, 102; and because it conflicted with statutes, a constitutional provision and an established principle of public policy. *Thompson* v. *Riggs*, 5 Wall. 663; *United States* v. *Macdaniel*, 7 Pet. 1; *Basey* v. *Gallagher*, 20 Wall. 670, 684.

In *12 Cyc. 1054–5*, it is said:

> The meaning of the rule that a usage or custom must not conflict with the law is clear, and the rule itself easy of application * *

> But if it conflicts with an established rule of public policy, which it is not to the general interest to disturb * * then it will not be recognized in courts of justice * * and whenever there is a conflict between a custom or usage and a statutory regulation, the statutory regulation must control.

If a practice must yield to a statute, much more must it yield to a constitutional provision. So a divided practice, varying in different districts will not suffice, because the power can not be enjoyed in one district and denied in another. Unless the practice be as general as the whole area over which the rule is to extend, it would be as reasonable to insist that the rule conform to that part of the practice which is opposed as to that part which is favorable to its exercise. Unlike an election contest, the question may not be settled by majorities. In such a case no inference whatever is to be drawn.

The cases cited in respondent's brief, pp. 61–63, but declare a phase of the rule announced by the authors cited on pages 54–55—a rule that we conceded at the outset. This case does not fall within the rule.

To overcome the objection that a power may not be transferred by usage from the executive to the judiciary, respondent urges that this is not an exercise of the pardoning power; that a full pardon operates to relieve of the charge and consequences, preserving civil rights if granted before, and restoring them if granted after conviction; whereas a suspension of execution does not restore civil rights lost on the imposition of sentence. It is not, however, an

essential of the pardoning power that there be restoration of civil rights or that the sentence be completely eliminated. In the case of both reprieves and commutations there never can be any restoration of civil rights and the sentence remains, for a period at least, suspended over the defendant. This feature has been already considered.

Granting, however, for argument's sake, that suspension during good behavior is distinguishable from a reprieve and may be viewed as a species of parole or probation, i. e., such a power as might be exercised by courts or judges if authorized by Congress, the case is not made by usage because it fails to establish an implied grant of power from Congress, and for these reasons:

(1.) The statutes providing for the punishment of crime are opposed to the idea; (2) the established rule of public policy requires the accomplishment of some punishment; (3) the practice has not been general throughout the United States; (4) it has not been uniform either within States or in a single district; (5) oftentimes it has been exercised simply because believed to be tolerated by the Government and in instances only because of a corresponding State practice founded on statute. (6) Since 1891 wherever practiced it has been in the face of the decision in *Wilson* v. *United States*, *supra*, expressly denying the existence of the alleged power and since 1894 in the face of the declaration of this court that the question was then undetermined. (7) The action of Congress itself precludes the implication of dele-

gated authority. While it has bestowed a limited power of parole and probation as to specific crimes on the Supreme Court of the District of Columbia, it for years has refused to do so in the case of other Federal courts. Having bestowed it as to the District it can not be urged that its refusal to otherwise bestow it was because it considered it unnecessary. Moreover, its own proceedings show that the Attorney general had suggested the lack of power, and that Congress itself regarded it as a questionable matter that should be set at rest. (House Rep. 566, *infra*).

The *Midwest Oil* case, 236 U. S. 459, *et seq.*, is not, and could not be, urged in justification of respondent's contention. There the practice was by the President *alone;* was steadily and uniformly indulged in for over eighty years; and always "under a claim of power so to do" (p. 469). Congress had repeatedly, both expressly and by implication, recognized the practice (pp. 471–79, and 34 Stat. 536). This court had also recognized it as early as 1867 in the *Grisar* case (p. 471).

In the *Midwest* case it said that Congress had the power of a private landowner, and as such, might select any agent for the public lands, and that laws as to the public lands are not "of a legislative character in the highest sense of the term" (p. 474). The court repeatedly speaks of the President as "the agent in charge" (pp. 474, 482), and finally, says:

> Nor do these decisions mean that the executive can by his course of action create a power (474).

RESPONDENT'S SO-CALLED "ORIGINAL REASONING" IS FALLACIOUS.

Respondent devotes seven pages (48–54) to original reasoning in support of his claim. Briefly his points are:

1. Minimum sentences are often too severe.
2. If courts are denied this power, for like reason grand juries must be denied power to refuse to return bills, and district attorneys the power to nolle pros indictments.
3. Concurrent service of sentences would be impossible (p. 49).
4. Change of social conditions demands restoration to judges of the common law power of reprieve, and an amplification of its scope to cover "all extraordinary cases."
5. People would regard with horror a court that would send Henahan to prison for five years.
6. England has no system of minimum penalties. The power is not needed there. We need it here until minimum penalties shall be abolished (pp. 50, 51).
7. Without the power, trivial offenses would be followed by cruel and unusual punishments.
8. Self-respecting judges should retire rather than become instruments of oppression, by administering the statutory penalties in all cases.
9. The word "court" involves a tribunal having such power.
10. Pardons are too difficult of procurement to be within the reach of the poor or ignorant.

11. Too much cruelty must be inflicted before Congress would give heed.

12. If the power is solely executive, Congress could not give relief (pp. 52, 53).

13. In the "*few extraordinary* cases" the power should exist (p. 53).

14. No complaint has been heard of its exercise, or of the exercise of the kindred power to admit to bail (p. 54).

Such reasons as numbers 1, 4, 5, 6, 7, 8, 10, 11, 13, and 14 should not be seriously urged upon this court. They are appropriate only for legislative consideration. Number 8—sequential on numbers 1 and 5—is startling in its suggestion that a judge who has taken oath to faithfully administer the law can not impose a sentence prescribed by a confessedly valid law without forfeiting his self-respect and becoming an object of horror, and that he should resign rather than enforce minimum penalties.

We quote an extract from the opinion in *Ex Parte Poulson*, Fed. Cases, No. 11,350, reading:

> The judges must be passive. It is not for them to be the first to set the example of disobedience to the law, or attempt to evade plain enactments; most especially not by the exercise of a forbidden jurisdiction. (19 Fed. Cas. p. 1208.)

and contrast that stoical declaration with the recent action of a Federal judge who found it consonant with his oath not to resign but rather to refuse to impose the minimum penalty decreed by law, and to

name a lesser one, unauthorized save by his own decree.

If these high officials, alone authorized to declare the limit of power, and prevent unauthorized action, in any branch of the government, themselves grasp forbidden power, who shall say them nay? The people are quick to note such action, and to apprehend the danger it must spell for them and their property. Seeing no relief under existing conditions, they are attracted to "judicial recall," as a simple means of control, forgetting the Pandora's box of evils that might be loosed upon them should they so destroy the independence of their judges.

Point 2, *supra*, is a *non sequitur*. Judges deal with self-confessed or convicted violators of laws imposing specific punishment. Grand juries consider mere accusations against possibly innocent persons, under laws empowering them, at their discretion, to find or refuse bills, regardless of the desires of the district attorney or court. *Hale* v. *Henkel*, 201 U. S. 61, 62, 63. And district attorneys before trial on their own responsibility, and during trial with the concurrence of the trial judge, deal with a charge denied by still presumably innocent persons, and under a power undisputedly recognized at the common law. *Reg.* v. *Allen*, 5 L. T. R. 636; *Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Schumann*, Fed. Cas. 16235; *United States* v. *Watson*, Fed. Cas. 16652; *United States* v. *Coolidge*, Fed. Cas. 14858; *United States* v. *Shoemaker*, Fed. Cas. 16279; *United States* v. *Stowell*, Fed. Cas. 16409; *Commonwealth* v.

Cain, 102 Mass. 487; *Reynolds* v. *State*, 3 Ga. 53; *State* v. *Hickling*, 45 N. J. L. 152; *State* v. *Wiley Mathews*, 98 Mo. 125; *State* v. *Bugg*, 6 Robinson, 63 (La. 1843); *State* v. *McLane*, 31 Tex. 260.

Of point 3, *supra*—as a man may commit two crimes by the same act, and at the same moment (*Gavieres* v. *United States*, 220 U. S. 338; *Ebeling* v. *Morgan, etc.*, 237 U. S. 625; *Morgan, etc.*, v. *Devine*, *ib.* 632), why may he not serve sentence for each crime during the same period unless this be forbidden by statute? The rule of concurrent service seems never to have been questioned at the common law (*United States* v. *Paterson*, 29 Fed. 775; *People* v. *Whitson*, 74 Ill. 20, 27; *James* v. *Ward*, 2 Metc. (Ky.) 271; *Miller, Warden*, v. *Allen*, 11 Ind. 389; *Ex parte Goffard*, 25 Nev. 101; *Prince* v. *State*, 44 Tex. 480); and is conceded by respondent (brief p. 59).

Of points 2 and 3 it must also be said that the power of grand juries to hear, district attorneys to dismiss, and of a court to concurrently sentence are powers independent of and in no wise related to the power to indefinitely suspend sentence. It is not at all necessary that we deny the one to defeat the other; and it will be time enough to consider each of the first named three powers when it shall be challenged in a proper case.

As to Point 6, *supra*, it is hardly correct to say that England has no system of minimum penalties. Until the passage of the Penal Servitude Act of 1891, their system was like ours. By that Act (54 and 55 Vict. Ch. 69) a three year minimum was preserved in

all cases of sentence to *penal servitude;* but the court was empowered to impose imprisonment instead of penal servitude, in which case there was no minimum—though the death penalty still remained the only and therefore the least punishment for certain crimes. In all the time before 1891, however, while England's case was like our own, no judicial power to suspend execution was enjoyed. Really this contention amounts but to this: that, because in his opinion minimum penalties are unwise, courts should lend themselves to blocking the enforcement of such laws until Congress shall be moved to repeal them.

Point 10, *supra*, advances the thought that the executive reprieve and pardon is not sufficiently available to the poor and ignorant; wherefore judges, because able to act instantly, should arrogate this power to themselves. It is unnecessary to point out the fallacy of such reasoning or here defend the adequacy of the reprieve and pardon power.

Point 4, *supra*, as inviting a new scheme of government, should be urged only upon Congress, and with an appropriate constitutional amendment. While Point 11, *supra*, would apply equally to all remedial legislation and warrant judges in assuming any function in advance of legislative authority.

As to Point 13, *supra*, we ask: Where is the authority for applying the power to "a few extraordinary cases" only; by what principle shall that class be delimited; and how shall individual judges be inspired to uniform action in their inclusion or exclusion of particular cases?

As to Point 14, *supra*, there is no similarity between the act of admitting to bail and of indefinitely suspending sentence, for in the former a court acts under constitutional mandate and statutory procedure in the case of presumably innocent men. Because of the implied challenge in the assertion of respondent that the practice has endured without complaint (brief, pp. 54, 80) we quote from among many on file in the Department of Justice a typical letter:

> This man * * * has been * * * conducting or participating in mail frauds * * * for many years. Whenever his arrest is caused on account of continued complaints, he is able to plead guilty and procure a suspended sentence. At first glance one suspension of sentence will be overlooked. A second one is questionable * * * But when (he) continually sets about * * * to ensnare and injure others * * * in * * * his criminal activities, it is high time that the public be informed as to the methods of officials * * * and an investigation be conducted to inquire the reason of this laxity, and (in-?) the administration of equal justice without fear or favor. (Dated, *July 12, 1915.*)

Agreeing with the principle of law declared in point 12, *supra*, we deny that it justifies judicial suspension. Respondent argues that the latter does not amount to reprieve or pardon. If this be true, no constitutional barrier prevents Congress from granting that power. If it be not true, Congress may, nevertheless, give

ample relief if it shall so desire by enlarging the present general parole law (36 Stat. 819). Parole is a legitimate subject of legislation because it does not amount to a pardon. If observed, it is legally efficacious to accomplish the service and expiration of sentence—not within the walls of the penitentiary, but under the control of a parole board or officer. This is as much a service as was rendered in the old days when the convict was farmed out to private contractors. The system is the product of advanced modern thought, chiefly because, without affecting the running of sentence, it affords the convict an opportunity to reestablish himself in society and, if successful, to be discharged of the sentence when the period of its term has expired.

Judicial suspension, on the other hand, leaves the sentence hanging over the convict for all the remainder of his life, to be enforced whenever, if ever, the judicial will shall so decree. Such a practice is quite contrary to the policies of modern criminology. We refuse to be put in the attitude of opposing these advanced policies, only suggesting that it is a better legislative policy to administer parole through a board or officer, independent of courts in all cases where such action might lay a court open to suspicion of the sort referred to by Blackstone, *supra;* and that Congress seems to have recognized this latter policy both in its general parole law (36 Stat. 819) and (by excluding the graver offenses from the operation of the act) also in the probation law effective in the District of Columbia. (36 Stat. 864.)

Yielding to none in respect for the judicial office, we would protect it if need be against the judge himself, to the end that there may be insured for it that high regard it ought always to enjoy. In short, we but urge the judges to put themselves in accord with the Constitution and laws they have sworn to uphold and enforce by awaiting statutory authority for parole or probation and refraining from attempts to reprieve, to pardon, or to indefinitely suspend sentences.

Part II.

REPLY TO BRIEF OF RESPONDENT.

A second brief, written by respondent in person, has been received since the completion of the above reply to the brief of Attorney Marshall. It consists chiefly of attempts to exhibit the alleged inadequacy and hardship of the present statutory system demanding minimum punishments.

Respondent complains of the Attorney General's expressed inability to cause to be paid the general expense incurred by respondent in these proceedings (brief, p. 3), as well as of the Attorney General's attitude in making an issue and asking for proof of the alleged details of practice (brief, p. 3).

The course pursued by the Attorney General is in the one case a matter of statutory observance in the disbursement of appropriations and in the other conforms to the orderly course of pleading. A further discussion of either matter is deemed unnecessary.

Respondent questions the form of remedy here sought, but announces his willingness to waive this feature. (Brief, pp. 2, 3.) This is beyond his power, for it involves a suggestion of lack of jurisdiction of this court. The procedure, however, is in exact accord in its every step with that approved by this court in *The United States, petitioner*, 194 U. S. 194. And though respondent thinks otherwise, the petition here seeks among other relief that which respondent insists alone would be proper, *i. e.*, to compel the issuance of a commitment.

Respondent endeavors to bind the Department of Justice to the practice by its acquiescence. (Brief, p. 7.) United States Attorneys have no authority to commit the Department of the Government in such matters. Some might act in one direction and others in the opposite. Casual letter requests from the department to judges ought not to weigh against the official communication of the Attorney General—the Department head—to Congress. Attorney General Miller on January 24, 1890, advised that—

> I am not aware by what provision of law a judge can suspend a sentence at all. On this matter, however, I express no opinion. (House Rep. No. 566, 51st Cong., 1st sess., vol. 2, 1889–90.)

Some judges were aware that the Department of Justice was challenging the power, for in a letter written by a Federal judge and before Congress in 1914, it is said:

> There has been considerable query raised by the Department of Justice with respect to

> the authority of the court to suspend sentence, and it has *up to the present time* depended upon the right of a court to allow a *sentence to be postponed*, or to let the defendant be discharged without sentence until after the term has expired and the case has lapsed.

No uniform acquiescence, nor indeed, any acquiescence at all against the Department of Justice can be established. On the contrary both judges and Congress knew that the Department was questioning and challenging the power. Of course, neither district attorneys nor the Department of Justice, nor its head, can alter the law to confer power where none otherwise existed.

After advancing contentions appealing to every impulse of mercy, respondent urges (Brief, pp. 8, 9) that courts ought not to be forced to resort to "subterfuge" and "expediency" to avoid the "unvarying and rigorous application of the law." Agreeing to this, we add that we do not understand how such a resort could ever be excused, much less be justified. A judge unable to resist the impulse to resort to such subterfuges and expediencies should not hold the office, for he can not faithfully discharge its duties.

Respondent upholds the action of the Pennsylvania judge who imposed a lesser term than the minimum prescribed by law (brief, p. 10), and, while protesting that he recognizes "a duty to adhere to statutory penalties," yet asserts that his court ought not to be "required to impose a sentence as a minimum very far beyond that which, independent of statute, the circumstances in hand peculiarly call for," and that

to confine Henahan five years (the minimum) "would be shocking, a miscarriage of justice instead of its due administration." (Brief, pp. 9, 10.) We confess to a difference in view as to rights and duties of judges so radical that we shall not attempt to reconcile it.

While he disclaims having capriciously or arbitrarily suspended execution (brief, p. 10), none the less has he done so; for, in a legal sense, an indefinite postponement during good behavior, because not warranted by the needs of judicial administration, is both capricious and arbitrary.

The suggestion that the *Wilson* case, 46 Fed. 648, is overruled by the *Adams* (*Allen*) case (brief, p. 11), is an error. The decision in the former, that an attempt to suspend a sentence is a void act, is in entire harmony with the decision in the latter that if such a void order be incorporated in a sentence otherwise valid, the valid portion is not affected thereby. The Circuit Court of Appeals in the *Adams*, or *Allen*, case upheld the Government's contention, and that contention was urged as a sequence of the position taken by the Government in this case.

The concession of respondent (brief, p. 13), that a practice otherwise improper may not be sustained in Federal courts merely because it follows a State court practice within the same district, so minimizes the importance of State decisions—especially those of his own district—that the Government contents itself with what was said in that regard in reply to the Marshall brief (Part I hereof).

His concession (brief, p. 16) that a "reprieve" is quite different from a "suspension of sentence," makes inapplicable all the common-law decisions cited in the Marshall brief and leaves the claim that the latter power existed at the common law without support in these authorities.

We are not surprised, therefore, that respondent finds that the most recent article published in the September–October, 1915, American Law Review by Barnett on "Executive, Legislative, and Judiciary in Pardon" reaches conclusions opposed to his claims here. (Brief, p. 7.)

Much of respondent's reasoning (pp. 19–23) assumes without argument or citation of authority that the practice was well established in the time of Hale and Blackstone. Quotations from these writers in either the Government's original brief, the Marshall brief, or the reply to the latter (Part I hereof) shows that such was not the fact. We can not acquiesce in the claim that trial courts are best equipped for the functions of mercy and that a court power to suspend is essential to deal with crime according to the modern idea. (Brief, p. 20.) We insist that nothing less accords with the modern idea than a procedure which hangs a sentence over a convict for the balance of his life to be enforced at any time at the will of a given judge or any of his successors in office. Were this view erroneous, however, respondent's concession that "Congress may legislate this particular attribute away" (brief, p. 21) carries the implied admission that it is not an inher-

ent elementary power of a "court" as that word is defined, and that if not inherent, congressional action is as necessary to bestow it upon a court as it otherwise would be to take it away.

We fail to understand respondent's assertion that Congress has not enacted a general parole law. (Brief, p. 22.) The act of June 25, 1910 (36 Stat. 819), is commonly so referred to, and seems to be such an act.

Part III.

There has also just been lodged with the clerk of this court a "Memorandum Submitted by the New York State Probation Commission." This refers only to the Sessions case (N. Y.), and the Marks case (Mass.). Assuming a necessary interdependence between suspended sentence and the probation or parole system, it argues the advantages of the latter, being in truth but a plea for the preservation of probation. Recognizing as we do its worth, and the legislative authority to establish such a system, this "Memorandum" needs no answer, save to say that as already pointed out the practice of suspended sentence is wholly unrelated to the statutory system of probation or parole.

Thomas Watt Gregory,
Attorney General.

John W. Davis,
Solicitor General.

Wm. Wallace, Jr.,
Assistant Attorney General.

December, 1915.

APPENDIX.

(Published in "Ohio Law Bulletin" November 15, 1915.)

NISI PRIUS AND SPECIAL TERMS.

State v. Radcliffe.

COURTS—CRIMINAL LAW.

[Franklin Common Pleas, October 9, 1915.]

STATE OF OHIO v. JOHN RADCLIFFE.

Courts Cannot Suspend Sentence in Felony Cases.

Courts have no inherent judicial power indefinitely to suspend sentences in felony cases, but their criminal jurisdiction is fixed by positive and irrevocable provisions of statute; Sec. 13706 G. C. authorizing suspension of sentence in cases where accused has never before been imprisoned for crime provides the only condition under which sentence may be suspended.

MOTION to suspend sentence.

Robert P. Duncan and *Franklin Rubrecht*, for plaintiff.

Timothy S. Hogan, Ray S. Bates and *C. B. Shook*, for defendant.

KINKEAD, *J.*

This case was tried and determined by verdict of a jury at the April term, 1915. Defendant was found guilty of burglary. In due course a motion for a new trial was made and overruled. Thereupon sentence was pronounced, record of all of which was duly made at that term. Thereafter, at the same term, on request of counsel, the court heard argument on application for suspension of sentence. At this time, after hearing arguments, the court informally expressed the opinion that it was doubtful if it possessed power to suspend sentence in such a case. Thereupon by agreement of counsel

an entry was put on at the April term setting aside the order overruling the motion of new trial. It did not actually refer to that part of the entry touching the sentence of the defendant to the penitentiary. The understanding or agreement was that briefs were to be furnished on the question of power to suspend the sentence.

A formal application is made for an order suspending the sentence. In its support reliance is placed upon the decision in *Weber* v. *State*, 58 Ohio St. 616 [51 N. E. Rep. 116; 41 L. R. A. 472]. In that case the defendant, under an indictment for keeping a room for gambling, was sentenced to imprisonment in the county jail for a period of ten days, and to pay a fine of $400, which was suspended. This was a misdemeanor.

In a *per curiam* report it was stated in the syllabus that:

> In a criminal case the court has power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided.

The trial court in that case of its own motion at the same term at which the sentence was pronounced set the order of suspension aside, because the defendant violated its conditions.

In support of the present application, the case of *State* v. *Whiting*, 83 Ohio St. 447, decision without opinion is also cited. In that case the defendant was found guilty of the crime of cutting with intent to wound, a penitentiary offense. The sentence was suspended by the trial court and was affirmed by the Supreme Court, without report.

Decisions of courts derive their value as controlling authority from the reason and logic of the conclusion. In the *per curiam* report and the unreported decision there is nothing but the bare conclusion unsupported by any statement of the reason or grounds therefor. It is merely held that the court has inherent power to suspend a sentence unless otherwise provided. The unreported decision was made since the enactment of Sec. 13706 G. C. The inference is claimed therefrom that such power is supposed to exist in spite of the statute which regulates the conditions under which a sen-

tence may now be suspended, and that the court must have so considered it.

My brother Dillon of this court, *Lee, In re*, 16 Dec. 533 (3 N. S. 533), held that:

> In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made.

This decision was with reference to a suspension of sentence by a police court, and was entered upon the authority of *Weber* v. *State*, 58 Ohio St. 616 [51 N. E. Rep. 116; 41 L. R. A. 472].

There is authority in some jurisdictions which sustains the view that a judge or court, in the exercise of inherent power may suspend a sentence. Conspicuous among the precedents on this side of the question is *People* v. *Court of Sessions*, 141 N. Y. 288 [36 N. E. Rep. 386; 23 L. R. A. 856], which asserts that the power to suspend a sentence finds its support at common law which has been the uniform practice of the courts and is supported by numerous adjudged cases as well as by writers of acknowledged authority on criminal jurisprudence. The inherent power of the common law courts was thus relied upon though there was in that state a statute which authorized a suspension. The case can not well be regarded as an authority because of the existence of the statute, and for the further reason that the common law doctrine whatever it was, cannot have controlling effect in this state for reasons hereafter stated.

The cases of *State* v. *Crook*, 115 N. C. 760 [20 S. E. Rep. 513; 29 L. R. A. 260]; *State* v. *Addy*, 43 N. J. Law 113 [39 Am. Rep. 547]; *Gibson* v. *State*, 68 Miss. 241 [8 So. Rep. 329]; *People* v. *Patrich*, 118 Cal. 332 [50 Pac. Rep. 425]; *Williams* (*Ex parte*), 26 Fla. 310 [8 So. Rep. 425], and perhaps some others support the doctrine of inherent power.

The greater number of decisions in the several states do not support the rule of inherent power. One of the best considered opinions is that in *Clendenning, Ex parte*, 22 Okl. 108 [97 Pac. Rep. 650; 19 L. R. A. (N. S.) 1041; 132 Am. St. Rep. 628], which involved a question of power to

revoke an order of suspension, after lapse of time of sentence and after term and the right to issue commitment.

It is stated by the court that:

> Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent that in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future indefinite time, depending on the happening of an uncertain contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence, and after the term, is illegal.

People v. *Barrett*, 202 Ill. 287 [67 N. E. Rep. 23; 63 L. R. A. 82; 95 Am. St. Rep. 230], is a recent well considered case. The power, which is universally conferred, to delay pronouncing judgment for a reasonable time, to hear and determine motions for new trial, or to give time for perfecting an appeal or writ of error, is mentioned as the only power which a court has; power to indefinitely suspend the pronouncing of sentence, or its execution is denied. To allow such a power, it is pertinently observed, would place the criminal at the caprice of the judge.

It is further said:

> That whatever the common law practice might have been, the legislature has adopted a different method to give persons convicted of crimes the opportunity to reform, by providing a system of parole and boards to administer the same. In view of the expressed policy of the legislation of this state we are disposed to hold that the trial courts do not have the power to suspend the imposition of the sentence indefinitely after conviction, or to release the prisoner.

In *Tuttle* v. *Lang*, 100 Me. 123 [60 Atl. Rep. 892], it was remarked:

> In such case (having suspended sentence) having completed its judicial functions, it has voluntarily surrendered all further control over the case and person.
>
> After sentence has been pronounced in a criminal case the court cannot, as a matter of lienency to the defendant, suspend indefinitely its execution.

Webb, In re, 89 Wis. 354 [62 N. W. Rep. 177; 27 L. R. A. 356; 46 Am. St. Rep. 846].

In *Clendenning, In re, supra*, it is said:

> Were such a course permitted to trial courts, and did it receive the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute.

Grundel v. *People*, 33 Colo. 191 [79 Pac. Rep. 1022; 108 Am. St. Rep. 75]:

> In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term, and is, in effect a discharge of the prisoner.

State v. *Hunter*, 124 Iowa 569 [100 N. W. Rep. 510; 104 Am. St. Rep. 361]:

> An indefinite suspension of a sentence on conditions is, in practical effect, a conditional pardon.

In *People* v. *Reilly*, 53 Mich. 260 [18 N. W. Rep. 849], it is said:

> If such a power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years.

United States v. *Wilson*, 46 Fed. Rep. 748:

> Courts have no power to suspend sentence except for short periods pending the determination of other motions, or considerations arising in the cause after verdict.

A court may delay pronouncing judgment in a criminal case for a reasonable time to hear and determine motions for new trial, etc., or to give the defendant time to perfect an appeal, or writ of error, or for other proper causes; but it cannot suspend indefinitely the pronouncing of sentence or the execution of judgment. If a judge can delay the sentence one day he can delay it for any length of time. *People* v. *Barrett, supra*.

"The authority to wholly relieve parties from a conviction for crime is not given to the courts but belongs to the par-

doning power." *People* v. *Blackburn*, 6 Utah 347 [23 Pac. Rep. 759]; *People* v. *Brown*, 54 Mich. 15 [19 N. W. Rep. 571].

The power to indefinitely postpone the punishment prescribed by law by suspending the execution of a sentence is the power to perpetually prevent punishment, a power which, under the provisions of the constitution does not exist in the courts. *Neal* v. *State*, 104 Ga. 509 [30 S. E. Rep. 858; 42 L. R. A. 190; 69 Am. St. Rep. 175]; *Miller* v. *Evans*, 115 Iowa 101 [88 N. W. Rep. 198; 56 L. R. A. 101; 91 Am. St. Rep. 43].

The case of *Commonwealth* v. *Mayloy*, 57 Pa. St. 291, is instructive in that it makes clear the essential distinction between the inherent power of the common law courts to suspend a sentence and the power of our state courts in the matter. The material difference between the power of common law courts and that of our courts is made clear. The difference in the practice is shown to demonstrate how improbable it is that our courts should possess such inherent power. The argument is "that after the judgment or sentence is pronounced, which is but the judgment of the law, was intended, and ought to be final so far as the courts are concerned, with the execution of the sentence which follows, courts have nothing to do, nor ought they."

We have reviewed some of the authorities bearing on the question. The suggestions contained in views expressed show that the trend of opinion and better reason is against the exercise of such power. It seems entirely clear that basic reasons underlying the common law rule are inapplicable to the conditions under the constitution and statutes touching judicial jurisdiction and power in criminal cases. Common law doctrines may be adopted and applied only when conditions so warrant, and not where the whole plan of criminal procedure, jurisdiction, and judicial power has been constructed on a wholly new basis. Courts must be cautious as well as zealous in the exercise of power. The function of mercy, clemency, parole, probation, or suspension has been carefully designed, to be placed in hands of other officials than the courts. It is true that nothing specially is said about the question of inherent power. Nothing, it seems, can more effectually demonstrate the want of such power than our constitution and statutes.

This brings us to the precise point of distinction between the common law jurisdiction over crimes and the constitutional and statutory jurisdiction of our state.

The constitution creates judicial power, but does not prescribe any jurisdiction in criminal matters. There can be no judicial power without jurisdiction. If the jurisdiction prescribed by statute excludes all judicial power exercised by the judiciary in criminal cases, how can any inherent power be exercised in disregard of statutory penalty, and regulations concerning the assessment thereof? Article 4, Sec. 1, of the constitution, vests judicial power in the several courts,—embracing the court of common pleas, the one possessing original jurisdiction in criminal cases. Art. 4, Sec. 4, of that instrument also provides that: "The jurisdiction of the court of common pleas and of the judges thereof shall be fixed by law."

No jurisdiction whatever is conferred on the common pleas court by the constitution in criminal cases, and it can exercise none until conferred by law, by statute. *Stevens* v. *State*, 3 Ohio St. 453; *Allen* v. *Smith*, 84 Ohio St. 283 [95 N. E. Rep. 829; 24 Ann. Cas. 611].

In deciding the question whether the court has inherent power to suspend sentence, the distinction between judicial power and jurisdiction should be kept in mind. Judicial power of necessity can be exercised within the scope of jurisdiction and not beyond it.

A comparison of judicial power as exercised within the scope of the statutory jurisdiction in criminal cases with that exercised in civil cases will clearly illustrate the distinction sought to be made. It will show how such power in civil matters is exercised according to the course of the common law, whereas in criminal cases it is to be exercised without regard to the common law, but strictly in accord with the provisions of the statutes. Having no judicial power in the latter class of statutes except as derived by statutes, courts can not exercise any power derived from any other source. Common law crimes and procedure have been abrogated which takes away all judicial power heretofore existing at common law, not specially provided for by statute. Judicial power in civil cases is largely dependent upon the common law, while in criminal cases it is not governed by the common law at all.

Jurisdiction in civil cases is conferred in part by constitution and in part by statute. Section 11215 G. C. provides that this court "shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the original jurisdiction of justices of the peace."

From the nature of things civil jurisdiction could not be particularly stipulated or prescribed for as is done in criminal cases. By general understanding in the adoption of our constitution and civil code of procedure, jurisdiction in civil cases is to be exercised according to the course of the common law. In rendering judgment in such cases, the court is to be controlled by the common law; within the limits of procedural limitations as to terms and other matters it may modify, change or set aside its judgment once rendered. That is, in concluding upon what judgment is to be given the court exercises the inherent judicial power of the common law courts, unrestrained by any limitations prescribed by statute, except such as may relate to formal matters not having any relation to the substance of judicial power.

In criminal jurisdiction we have never had any common law crimes nor any common law jurisdiction. This everybody knows to be axiomatic. The judgment of the court, in each case of conviction by verdict or plea of guilty, is fixed by positive and irrevocable provisions of statute. The so-called inherent power of the common law courts has nothing whatever to do with it. The court has no will or wish, and no discretion in respect to whether a sentence shall or shall not be pronounced, or whether it shall or shall not be enforced.

When the judicial sentence is pronounced by the court, the judicial power becomes *functus officio*, and all that must thereafter be done or that may be done is prescribed by positive provision of statute. Strict construction of criminal statutes excludes the exercise of any power not therein expressly provided for. When the sentence is entered the prisoner must be disposed of as the statutes provide. To permit the court to qualify its order of sentence by conditions not authorized by statute, would result in disregard of the acts of the legislature. When a sentence is pronounced jurisdiction ceases, unless the case be one within the statute authorizing a suspension.

To permit the judicial power to suspend a judgment required to be rendered by the mandatory provision of the statute would be to override the power of a co-ordinate branch of government which is vested with exclusive power to fix the jurisdiction and power of courts. It will permit a judge to substitute its judgment or caprice for the legislative function.

To sustain an inherent power of courts to suspend a sentence mandatorily required by statute would be an assumption of power, pure and simple. Criminal penalties as prescribed by statute represent the preponderant public opinion, as expressed by the legislature, which cannot be disregarded or modified by the judiciary, no matter how high and lofty its motive may be in any particular case where there is an inclination to suspend a sentence.

As before stated, the power of this court in civil matters is inherent in it as a common law court, to be exercised according to the common law doctrines. Its power to decide and adjudge on the merits of a case, is not prescribed by constitution and statute. Its final judgment is controlled or governed by common law doctrines and rules which are not express in the sense that a penalty of a criminal statute is.

In other words, the judgment to be rendered in the civil case may, in a sense constitute the individual judgment of the court, without control of specific requirement or limitation.

But the judgment and sentence in the criminal case is not the individual opinion or judgment of the judge or court, but is that of the legislature. Before the indeterminate and probation or suspension statutes, the judge or court had no discretion whatever, and was required to impose a sentence between the minimum or maximum penalty. Before the indeterminate statute, the court was bound to pronounce sentence within the statutes, the minimum or maximum term, or a term between the two. The enactment of the indeterminate law furnishes conclusive evidence that it was never intended that the court was to exercise clemency. Under these statutes the duty of sentencing according to their provisions is mandatory, the only discretion the court has being to suspend a sentence when conditions warrant it according to conditions fixed by statute.

Under Sec. 13706 G. C., the court has discretionary power to suspend the execution of a sentence, and to place the de-

fendant on probation when "the defendant has never before been imprisoned for crime."

What would be the use of enacting such a statute if it was settled that courts had inherent power to suspend a sentence, the terms of which are prescribed by statute. If a court could prescribe the conditions of the order of suspension, why the necessity of detailed provision as to the conditions of suspension and of the regulation of those so placed on probation.

All these statutes and the whole criminal code, as well as the difference between judicial power in criminal and civil cases, in no uncertain language expressly and inferentially, demonstrate, in my judgment the utter want of the inherent power of suspension.

Such inherent power as it is conceded courts have, as in contempt and disbarment, bears no analogy to the claim of inherent power asserted in this case. Such power exists only for the purpose of maintaining the dignity and power of the judiciary.

There were cogent reasons for sustaining the inherent power of common law courts to suspend sentence. The practice had its origin in the hardships resulting from "hard and fast" rules of procedure, under which there was no power to grant a new trial and when the verdict could not be reviewed by a higher court, and where it was doubtful whether the accused could have the benefit of clergy. Arbitrary reprieves were granted in such cases, and in certain cases where youths were convicted of their first offense, the power belonging to every tribunal invested with authority to award execution in a criminal case. Hale P. C. ch. 58, p. 412, 1 Chitty Cr. L. (1st ed.) 617, 758.

Under our statutes the court is given power to pronounce sentence and to suspend in cases where there has been no previous conviction and imprisonment. The power to grant reprieve or pardon however, is invested in the executive exclusively.

However, so much some opinions may endeavor to distinguish a suspension of sentence from a pardon, the stubborn fact remains that a suspension of sentence upon certain conditions operates as a release from imprisonment. It is said that "the suspension of the sentence simply postpones the

judgment of the court temporarily or indefinitely, but the conviction, etc., remain and become operative when judgment is rendered, "while pardon blots out of existence the guilt." *People* v. *Court of Sessions*, 141 N. Y. 288 [36 N. E. Rep. 386; 23 L. R. A. 856].

The majority opinion is to the contrary that the suspension without authority is in effect a full release, because if there is no power to suspend, there can be no subsequent power to vacate the suspension and enforce the penalty.

The view taken by the court in *People* v. *Barrett*, *supra*, aptly expresses the situation in this state. The state had adopted a different method from that of the common law to give persons convicted of crime the opportunity to reform, by providing a system of parol, and boards to administer the same, as well as of pardons, and suspension and probation.

There is good and sufficient reason for not regarding *Weber* v. *State*, *supra*, as authority. Sec. 13706, G. C., specially provides the only condition under which a sentence can be suspended. It operates both as a grant and limitation of the power of suspension. A sentence may only be suspended in accord therewith.

I suppose it will have to be admitted that the conclusions of the court in *State* v. *Whiting*, *supra*, are not in accord with those contained in this opinion. My experience in following decisions in unreported cases has not been very satisfactory. I adopted a reported opinion of the trial court on the question of embezzlement of public money, which was affirmed by the Supreme Court. But the court passed over the unreported decision in profound silence laying down a new rule and reversing my conclusion. So in this case I chose not to regard *State* v. *Whiting* as an authority. No one ever knows why an unreported decision is made. The court might have considered that it would have been futile to reverse the lower court because the prisoner had been turned loose in contravention of statute and there was no power to recommit him. That was the effect of the act of the trial judge, in my opinion, and such is the rule of decision in other states. That was true because the judicial act became *functus officio*. The doctrine of *Weber* v. *State*, *supra*, could no longer be relied upon because the statute had otherwise provided that a

sentence could only be suspended in case the accused had not previously been imprisoned.

I have thought it unnecessary to consider in detail the several statutes relative to the penalty to be assessed for each crime, to show the mandatory character therefor. It is important, however, to specially note the provisions of Sec. 13694 G. C. This provides that the court must inform the defendant of the verdict and to ask if he has anything to say why judgment of sentence shall not be pronounced against him. It requires also, if the answer is in the negative, that "The court shall pronounce the judgment provided by law."

It is difficult to perceive, therefore, how a court, by the exercise of power conferred by neither the statute nor the constitution, and as part of the sentence of the judgment required by law, can impose conditions of suspension in derogation of the statutes relative to probation, such as was done in *State* v. *Whiting*, the unreported decision. In that case the court imposed terms of probation entirely contrary to the statutory provisions contained in Secs. 13709 to 13715, which provide for a complete system of probation by the present state board of administration. The order that was made in *State* v. *Whiting*, *supra*, took the matter out of the hands of the state officials, with whom the legislature had entrusted the province and duty with respect to probation.

It is also pertinent to refer to the provisions of Sec. 2210 R. S., which provide that the effect of an order of suspension of sentence is to place the defendant on probation, under control of the board of managers of the institution. How, then, can a court suspend a sentence upon such conditions as are named in *State* v. *Whiting*, *supra*, which is in derogation of the terms and conditions of the section referred to?

My conclusion is that the court has no statutory or inherent power to suspend the sentence in this case.

At the time of the conviction of defendant I was inclined to suspend the sentence if it could be legally done, because he was under the influence of liquor. On maturer consideration, however, the story of the defendant appears so unreasonable as not to be worthy of belief. If he had been innocent he would not have fought the policeman as he did. An in-

nocent man would have acted differently, it would seem, in reliance upon the potency of innocence. I do not believe the officer would have made a wanton attack on the defendant nor do I believe that he did violence to the prisoner until the latter made it necessary.

The court declines to suspend sentence, both because it has no power, and for the further reason that it would injure the cause of justice to do so.

The former order vacating the overruling of the motion for a new trial having been made at the preceding term, an order may now be made overruling the motion, and the defendant is sentenced to an indeterminate term in the Ohio Penitentiary.

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